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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 654

TIDEE PRODUCTS, INC., *Petitioner,*

and

NATIONAL LABOR RELATIONS BOARD

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN SUPPORT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Memorandum For The National Labor Relations Board In Opposition, in arguing that the case is not ripe for review (Mem. Opp. p. 3), proceeds on the assumption that the Board, on the remand, will not exercise the make-whole power but in some other manner may satisfy the remand. This position

of the Board establishes that the case is ripe for review.

1. Despite the Board's attempt to minimize the ruling by the court below on the Board's power by characterizing it as merely an expression of views (Mem. Opp. p. 3), the court below did squarely rule that the Board has the power to grant a make-whole remedy (App. B, pp. 52a-62a).

The Board in its Memorandum in Opposition, quotes out of context, the clause from the opinion in the court below, "even if the Board declines to take the steps advocated by the Union" (Mem. Opp. p. 2). The "steps advocated by the Union", to which the court below referred, were those stated in the immediately preceding sentences which read as follows (App. B, p. 57a):

> "There may be difficulties in one of the proposals offered by the Union in this case; that the Company be ordered to pay dues, for the pay period 'lost' to the employees by virtue of the Company's violation, to the union they selected as their agent. We are in no position to gainsay the possibility that an agency might reject the proposal for reasons of sound administrative policy. And any such proposals would have to be shaped to take into account legal considerations.[10] . . ."

> "[10] Since the dues and initiation fees would have come from the employees' pockets and not from the Company, any assessment of these charges against the Company would have to be subtracted from back pay awards. This would avoid legal problems of a Board order awarding more than back pay."

The main make-whole remedy sought by the Union was the restitution of losses in wages and fringe benefits suffered by employees (App. B, pp. 63a-64a).

While the court below left the Board free on remand also to consider alternate remedies, the court made it clear that the Board was to conduct the remand on the basis that the Board had the make-whole power. Nothing the court said suggests any alternatives to an exercise by the Board of its make-whole powers. The court below specified that "we have specifically limited the scope of our remand first, to consideration of past damages * * * and second, to relate to damages based on a determination of what the parties themselves would have agreed to" (App. B, p. 61a).

The opinion of the court below thus makes it the law of the case on remand that the Board must accept, for further proceedings in this case, that it has the power to grant the make-whole remedy and on that basis determine which, if any, type of make-whole remedy, is appropriate to the facts of this case.

The Board in its decision in *Ex-Cell-O Corp.*, 185 NLRB No. 20 (1970) ruled that any financial reparation order, based on losses suffered during the period of litigation, was punitive and hence beyond the power of the Board (App. C, p. 85a). With specific reference to the decision below, the Board, in its *Ex-Cell-O* decision, stated that such an imposition on an employer was punitive even if all his objections to the certification were frivolous (App. C, p. 86a). Citing the decision of the court below in this case, the Board stated its disagreement therewith (App. C, p. 86a).

The Memorandum of the Board in Opposition indicates that the Board will attempt to work out remedies other than those barred by its *Ex-Cell-O* decision (Mem. Opp. p. 3). Proceedings on remand so limited

would not fulfill the remand. Only confusion and delay will ensue if the question here presented for decision by this Court is not decided now but postponed until further proceedings are conducted on the basis indicated in the Board's Memorandum in Opposition.

2. The Board suggests that the case is not ripe for review because on remand the Board might express reasons for refusing the make-whole remedy which may "satisfy the court of appeals" (Mem. Opp. p. 3). The Board could have filed a petition for rehearing if it believed that it could advance reasons which would convince the court of appeals that the Board had no power to grant a make-whole remedy. Having lost on this issue if the Board accepts the remand, the Board must follow the law of the case as laid down by the court of appeals and proceed to consider a make-whole remedy on the basis that the Board has the power to grant such a remedy. The advancing by the Board of this argument to this Court indicates that the Board has no intention of proceeding on the basis that it has power to grant a make-whole remedy. With the Board taking this position pursuit of the remand would be useless.

3. The Board suggests that the case is not ripe for review because on remand, instead of granting a make-whole remedy, the Board might give "alternative relief which neither party appeals or which the court concludes is adequate in the circumstances here" (Mem. Opp. p. 3). This suggestion further demonstrates that the case is ripe for review.

From the outset of this case the Union has sought a make-whole remedy. The court of appeals, not only

agreed with the Union that the Board had the power to grant such a remedy, but in addition made it clear that it believed that such a remedy was required (App. B, pp. 53a-60a). It also agreed with the Union's suggestion that principles of administrative law warranted a remand so the Board might have an initial try at shaping the make-whole remedy (App. B, p. 62a). At the time the Union advanced this suggestion, and the court below acquiesced in it, the Board had not disclaimed any make-whole powers.

In view of the long effort of the Union to secure a make-whole remedy, it borders on frivolous to urge seriously here that, on a second chance at remedy, the Board might come up with something less and different that will satisfy the Union.

Satisfaction of the court of appeals is irrelevant, because if the court of appeals is satisfied with something less than a make-whole remedy, the Union will be again seeking review by this Court of the same question as is now presented, without the intervening proceedings before the Board or the court below having advanced the cause in any regard.

Respectfully submitted,

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